

OPINION

The Defendant appeals as of right from the judgment of the trial court which found him to be in violation of the terms of his probation. He argues that the trial court abused its discretion. We affirm the judgment of the trial court.

On April 13, 1994, the Defendant was convicted of driving under the influence of an intoxicant (DUI),¹ and was sentenced to eleven months and twenty-nine days in the Williamson County workhouse. All but forty-eight hours of his jail time was suspended and he was placed on probation for the balance of his sentence.

About six weeks thereafter, on May 29, 1994 at about four-seventeen a.m., the Defendant was stopped by a deputy sheriff who testified that he "paced" the Defendant for about a mile driving seventy miles per hour in a fifty-five mile per hour zone. The deputy testified that the Defendant had a strong odor of alcohol on his breath and that his speech was slurred. The deputy stated that he administered three separate field sobriety tests to the Defendant, none of which the Defendant was able to successfully and satisfactorily perform. During two of the tests, the deputy testified that the Defendant almost fell down. The Defendant told the deputy that he had been drinking "all day at the lake." He also told the deputy that he had been drinking earlier that evening while at the races and that he had consumed three beers prior to being stopped by the deputy. The Defendant refused to submit to a test to determine his blood alcohol content. The deputy arrested the Defendant for DUI and driving on a revoked license. Based on these charges, a probation violation warrant was issued against the Defendant.

¹Tenn. Code Ann. § 55-10-401.

The Defendant testified that he had gotten up about three a.m. on the day before his arrest and gone fishing. He said that from the early morning hours of that day until about one or two o'clock in the afternoon, he had consumed four or five beers. Late in the afternoon of the day before his arrest, he had attended the automobile races in Nashville and had consumed three beers while there. He said he left there about eleven p.m. and had nothing further to drink. He was spending the night at his sister's house but his wife called him at three-thirty a.m. and asked him to come home because she was sick. The Defendant said he was on the way to his house when the deputy stopped him.

Based on the above testimony, the trial judge determined that the Defendant had violated the conditions of his probation, and ordered that the balance of the Defendant's sentence be served. On this appeal, the Defendant argues that the trial court abused its discretion in that the probation violation hearing should have been stayed pending the outcome of the DUI charge upon which the probation violation warrant was based. In the alternative, the Defendant argues that the trial court abused its discretion in ordering the Defendant to serve the balance of his sentence. The Defendant further argues that this court should reverse the "sentence in this matter" because the trial court, at the conclusion of the probation revocation hearing, did not place on the record the enhancement or mitigating factors it found.

"In determining whether to revoke probation, the trial judge need not find a violation of the terms of the probation has occurred beyond a reasonable doubt. The evidence need only show the trial judge has exercised conscientious judgment in making the decision rather than acting arbitrarily." Stamps v. State, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980), perm. to appeal denied, id. (Tenn. 1981). "In reviewing the findings of the trial judge, the judgment of the trial court is given the weight of a jury verdict." Id.

Both the granting and revocation of a suspended sentence rest in the sound discretion of the trial judge. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). The trial judge has a duty at probation revocation hearings to adduce sufficient evidence to allow him to make an intelligent decision. Id. The fact that the Defendant was not convicted of any of the offenses with which he was charged does not mandate dismissal of the probation violation warrant. State v. Delp, 614 S.W.2d 395, 396-97 (Tenn. Crim. App. 1980), perm. to appeal denied, id. (Tenn. 1981).

The judgment of the trial court will not be disturbed on appeal unless it appears that there has been an abuse of discretion. For an appellate court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

When a trial judge grants a suspended sentence, that judge demonstrates a certain amount of confidence that the Defendant will lead a lawful life. When the Defendant's subsequent actions violate that confidence, certainly the trial judge again exercises discretion in whether or not the suspended sentence should be revoked. Davenport v. State, 214 Tenn. 468, 474, 381 S.W.2d 276, 279 (1964); Thompson v. State, 198 Tenn. 267, 269, 279 S.W.2d 261, 262 (1955). The Defendant's subsequent actions may indicate that the initial decision to suspend the sentence was a mistake. All probationers are deemed to be on notice that they are not to engage in unlawful activity or otherwise conduct themselves inconsistently with good citizenship if they are granted probation instead of incarceration. Roberts v. State, 546 S.W.2d 264, 265 (Tenn. Crim. App. 1976).

The evidence contained in this record clearly supports the determination by the trial court that the Defendant violated the terms of his probation. The Defendant was not entitled to postpone the hearing on the probation violation warrant until after the trial of the subsequent DUI. Even an acquittal of the charges of DUI and driving on a revoked license would not have been dispositive of the charge of violating probation. In determining that the Defendant had violated the terms of his probation, it was not necessary for the trial court to consider enhancement or mitigating factors because the court was not sentencing the Defendant.

A certified copy of the Defendant's driving history reflects three prior DUI convictions and numerous other infractions. We are unable to conclude that there has been an abuse of discretion. The record reflects that the trial judge exercised conscientious judgment in making his decision.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

ROBERT E. CORLEW, III, SPECIAL JUDGE